(4)

No. 01-731

IN THE

SUPREME COURT OF THE UNITED STATES

GERALD GOLDBERG, EXECUTIVE OFFICER OF THE CALIFORNIA FRANCHISE TAX BOARD,
Petitioner,

v.

JAMES ELLETT,
Respondent.

E. LES SORENSON, EXECUTIVE DIRECTOR OF THE CALIFORNIA STATE BOARD OF EQUALIZATION,
Petitioner,

v.

CARMINE ARTIGLIO,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Brief of *Amicus Curiae* Multistate Tax Commission In Support of Petitioners

Paull Mines, General Counsel
Frank D Katz, Deputy General Counsel
Counsel of Record
Multistate Tax Commission
444 No. Capitol St., NW #425
Washington, DC 20001-1538
(202) 624-8699
Counsel for *Amicus Curiae*

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CARMINE ARTIGLIO,
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Brief of *Amicus Curiae* Multistate Tax Commission In Support of Petitioners

The Multistate Tax Commission ("MTC") submits this brief as *amicus curiae* in support of the Petitioners in accordance with the provisions of Rule 37.6 of the Supreme Court Rules.[1]

[1] No counsel for any party authored this brief in whole or in part. Only *Amicus* MTC and its member States through the payment of their membership fees made any monetary contribution to the preparation or submission of this brief. Consent of all parties to the filing of this brief is filed herewith.

INTEREST OF AMICUS CURIAE

The MTC is the administrative agency created by the Multistate Tax Compact ("COMPACT"). *See* RIA ALL STATES TAX GUIDE ¶ 701 *et seq.*, p. 657 (2001). Twenty-one States have legislatively established full membership in the COMPACT. An additional five States are sovereignty members and sixteen States are associate members.[2] This Court upheld the validity of the COMPACT in *United States Steel Corp.* v. *Multistate Tax Comm'n*, 434 U.S. 452 (1978).

The COMPACT embodies the response of States to efforts in Congress in the mid-1960s to preempt state taxation of interstate commerce. Congress had initiated those efforts because of complexities and inconsistencies of state income tax provisions imposed on multistate businesses. Today's substantial uniformity and simplification in these taxes resulting from the COMPACT and the Uniform Division of Income for Tax Purposes Act, *see* RIA ALL STATES TAX GUIDE ¶ 1361 *et seq.*, (2001), have worked to protect multistate businesses from undue burdens on their interstate commerce and thereby preserve state taxing authority. *See Barclay's Bank PLC v. Franchise Tax Bd.*, 512 U.S. 298, 312-14 (1994).

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[2] Compact Members: Alabama, Alaska, Arkansas, California, Colorado, District of Columbia, Hawaii, Idaho, Kansas, Maine, Michigan, Minnesota, Missouri, Montana, New Mexico, North Dakota, Oregon, South Dakota, Texas, Utah and Washington. Sovereignty Members: Florida, Kentucky, Louisiana, New Jersey and Wyoming. Associate Members: Arizona, Connecticut, Georgia, Illinois, Maryland, Massachusetts, Mississippi, New Hampshire, North Carolina, Ohio, Oklahoma, Pennsylvania, South Carolina, Tennessee, Wisconsin, and West Virginia.

The continued existence of the MTC is testament to the vibrancy of Our Federalism and proof that States can, indeed, come together to simplify and enforce in a consistent manner state tax provisions applied to multistate taxpayers. The capability of achieving a functioning nationwide system does not rest exclusively with Congress or federal courts.

The growing predominance of multistate businesses in our nation has resulted in a shift of power from the States to the Federal Government. Ensuring an adequate flow of revenue to the States, however, remains essential to fulfilling their assigned role within our federal union. Thus, a principal mission of the MTC is preserving state taxing authority and plain, speedy and efficient state tax remedies in face of a dominant Federal Government. The member States of the MTC have requested this *amicus* brief to bring to the Court's attention the evident disregard by the Ninth Circuit below of the primacy of state court jurisdiction over state tax matters.

REASONS FOR ALLOWING THE WRIT

Ellett and Artiglio filed bankruptcies listing state tax debts to which California did not respond. After the bankruptcy courts issued discharges and closed the bankruptcies, the State commenced collection proceedings on post-bankruptcy income. Ellett and Artiglio reopened their bankruptcies seeking to enjoin the tax collector. The Ninth Circuit ruled that the discharges from the initial bankruptcy proceeding were binding on the State and that the Eleventh Amendment was no bar to securing federal court injunctions under *Ex parte Young*, 209 U.S. 123 (1908), to stop the collection efforts of these state tax administrators.

I

MANIFEST CONGRESSIONAL INTENT IN THE TAX INJUNCTION ACT TO RESTRICT FEDERAL JURISDICTION OVER STATE TAX MATTERS WHERE STATE PROCEDURES ARE ADEQUATE OVERRIDES THE JUDGE-MADE EXCEPTION TO THE ELEVENTH AMENDMENT IN *EX PARTE YOUNG*.

The decision below improperly denies States the right to use their own plain, speedy and efficient state tax procedures to collect their taxes and protect their taxpayers.

The Ninth Circuit used the "fiction" of *Ex parte Young* to circumvent California's Eleventh Amendment sovereign immunity. It allowed private parties to use federal court to enjoin these state tax administrators from applying their adequate state procedures to determine whether the taxes in question were owed or were discharged in bankruptcy. This use of *Ex parte Young* to permit federal courts to block California's tax collection efforts and bypass California remedial procedures is inconsistent with how Congress and this Court have long viewed federal law and federal court jurisdiction in the context of state taxation.

Taxes are more central to the existence and operation of States than virtually any other power or activity. *Dows v. City of Chicago*, 78 U.S. (11 Wall.) 108, 110 (1871). Both Congress and this Court have embraced this cardinal principle by limiting federal court jurisdiction over state tax matters.

With the Tax Injunction Act, 28 U.S.C. § 1341, Congress expressly carved out an exception to federal court jurisdiction over actions seeking to enjoin the collection of state taxes:

> The district courts shall not enjoin, suspend or restrain the assessmer , levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State

This Court created an analogous exception to federal jurisdiction to sue States over state taxes pursuant to 42 U.S.C. §1983 for "deprivation of any rights, privileges or immunities secured by the Constitution and laws." Not only are plaintiffs barred from proceeding in federal court, *Fair Assessment in Real Estate Ass'n v. McNary*, 454 U.S. 100 (1981), but even in state court the cause of action against the State will be dismissed if the State provides adequate remedy. *National Truck Council v. Oklahoma Tax Comm'n*, 515 U.S. 582 (1995). The unanimous Court emphasized federal non-interference in this area.

> Since the passage of §1983, Congress and this Court repeatedly have shown an aversion to federal interference with state tax administration. * * *
>
> * * * Our cases since *Dows* have uniformly concluded that federal courts cannot enjoin the collection of state taxes when a remedy at law is available. * * *
>
> * * * Given the strong background presumption against interference with state taxation, the Tax Injunction Act may be best understood as but a partial codifica-

> tion of the federal reluctance to interfere with state taxation.

Id. at 586, 589, 590.

This hands-off approach expressly sanctions the competence of and preference for state courts to determine whether state tax collection violates federal constitutional or statutory provisions. *See Robb v. Connolly*, 111 U.S. 624, 637 (1884) ("Upon the state courts, equally with the courts of the Union, rests the obligation to guard, enforce, and protect every right granted or secured by the constitution of the United States and the laws made in pursuance thereof."); *Stone v. Powell*, 428 U.S. 465, 493, n.35 (1976) ("State courts, like federal courts, have a constitutional obligation to safeguard personal liberties and to uphold federal law."); *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261, 275 (1997) ("It is the right and duty of the States, within their own judiciaries, to interpret and to follow the Constitution and all laws enacted pursuant to it, subject to a litigant's right of review in this Court in a proper case.").

Application of state taxes to bankruptcy law is no different. State courts are fully competent to adjudicate whether a particular debt is discharged. 28 U.S.C. § 1334(b). The likelihood of divergent, or incorrect, state court decisions is no greater than the likelihood of divergent, or incorrect, lower federal court decisions. Ultimately, this Court resolves conflicts in lower courts on federal issues.

Significantly, this Court recently denied the use of the judge-made fiction of *Ex parte Young* in response to Congress's expressed restrictions on remedy. *Seminole Tribe of Florida v. Florida*, 517 U.S. 44

(1996). A federal action for injunction will not lie where Congress has prescribed the remedial scheme available to challenge a state action in a particular area and that remedial scheme is inconsistent with the breadth of injunctive remedies available under *Ex parte Young*. In *Seminole Tribe* the limitation was expressed through the greatly circumscribed remedies available to Tribes under the Indian Gaming Regulatory Act to challenge States' refusal to bargain in good faith over tribal gambling. Here, the limitation is even more restrictive—the outright ban in the Tax Injunction Act of federal court injunctions against collection of state taxes when adequate state remedies are available.

As the Tenth Circuit put it in *ANR Pipeline v. LaFaver*, 150 F.3d 1178, 1189 (10th Cir. 1998):

> The crucial inquiry is whether Congress has expressed an intent, through some kind of statutory scheme, to limit or prevent potential remedies in a private cause of action even though broader remedies might otherwise be available against the state through the *Ex parte Young* rule. If so, then under *Seminole Tribe*, the federal courts are not ordinarily free to go beyond that congressional intent.

The Ninth Circuit should have respected congressional intent in the Tax Injunction Act and refused *Ex parte Young* jurisdiction. Ellett and Artiglio had adequate remedies under California laws. California's post-bankruptcy collection efforts consisted of attempting to garnish Ellett's wages, Appendix (App.) at 32a, 42a, and offset Artiglio's income tax refund, App. at 59a. Under CAL. CIV. PROC. CODE §

706.076, Ellett could have had a hearing in days to argue to state court that the debt was no longer owed because of payment, satisfaction, or discharge. Artiglio could have used the standard tax refund proceeding under CAL. REV. & TAX. CODE § 6933 to get back his seized income tax refund check if the tax it covered was no longer owed. The condition of an adequate state remedy was met. No federal injunction should have been permitted.

This Court should grant certiorari because of the importance to our federal system of permitting States to control their own tax systems through procedures that adequately protect federal interests. No one questions the supremacy of federal bankruptcy law. The issue here is the jurisdiction of state courts to initially adjudicate the application of that law to state tax collection efforts.

II

A BANKRUPTCY COURT DISCHARGE IS NOT BINDING ON A STATE WHEN THE STATE DOES NOT CONSENT TO JURISDICTION.

Eleventh Amendment immunity also underlies the "threshold question" the Ninth Circuit decided below. That question asked "whether a State that does not consent to a bankruptcy court's jurisdiction . . . is nonetheless bound by the bankruptcy court's § 524 discharge injunction." App. 9a. The court held that the bankruptcy court discharge was binding on the State citing *In re Collins*, 173 F.3d 924 (4th Cir. 1999), *cert. denied* 528 U.S. 1073 (2000), and *Texas v. Walker*, 142 F.3d 813 (5th Cir. 1998), *cert. denied*, 525 U.S. 1102 (1999). Those de-

cisions do not withstand scrutiny under this Court's Eleventh Amendment jurisprudence.

The Eleventh Amendment bars suits in federal court by private parties against States. This Court has persistently reiterated that rule recently, insulating States from federal actions based on a variety of federal statutes. *Board of Trustees of University of Alabama v. Garrett*, 531 U.S. 356 (2001) (Americans with Disabilities Act); *Kimel v. Florida Bd. of Regents*, 528 U.S. 62 (2000) (Age Discrimination in Employment Act); *Florida Prepaid Postsecondary Ed. Expense Bd. v. College Savings Bank*, 527 U.S. 627 (1999) (patent law enforcement action); *College Savings Bank v. Florida Prepaid Postsecondary Ed. Expense Bd.*, 527 U.S. 666 (1999) (Trademark Remedy Clarification Act); *Seminole Tribe* (Indian Gaming Regulatory Act).

Suit by a private party debtor under the Bankruptcy Code is no different. A bankruptcy court must have jurisdiction over the State for its discharge order to bind the State. But the Eleventh Amendment precludes that jurisdiction. And Congress cannot abrogate the States' sovereign immunity through its Article I bankruptcy power. *Seminole Tribe*; *In re Murphy*, 271 F.3d 629 (5th Cir. 2001); *In re Mitchell*, 209 F.3d 1111, 1121 (9th Cir. 2000); *In re Creative Goldsmiths*, 119 F.3d 1140 (4th Cir. 1997).

Cases supporting the binding effect of a bankruptcy court discharge order on the federal government are instructive. *See United States v. Nordic Village, Inc.*, 503 U.S. 30, 36 (1992); *Hoffman v. Connecticut Dep't of Income Maintenance*, 492 U.S. 96, 103 (1989); *Neavear v. Schweiker*, 674 F.2d

1201, 1204 (7th Cir. 1982); *Gwilliam v. United States*, 519 F.2d 407, 410 (9th Cir. 1975). Those cases found bankruptcy court jurisdiction to bind the Federal Government to a discharge through a congressional waiver of sovereign immunity within the Bankruptcy Code, 11 U.S.C. § 106(a) (2001) and § 17(c) of the former Bankruptcy Act, 11 U.S.C. § 35 (c) (1976). No such waiver can be legislated against the States' Eleventh Amendment immunity.

Only a State can waive this immunity. When a State appears in a bankruptcy proceeding by filing a proof of claim, it consents to the court's jurisdiction to adjudicate that claim. *Gardner v. New Jersey*, 329 U.S. 565, 573-74 (1947). But if the State does not voluntarily appear in the bankruptcy action, no waiver of sovereign immunity can be divined. *New York v. Irving Trust Co.*, 288 U.S. 329 (1933), cited by the Ninth Circuit for the contrary position, represents a case in which the State did appear. In *Irving Trust* the issue was timeliness, not jurisdiction. The State claimed that its sovereign immunity allowed it to avoid compliance with the bankruptcy court's bar date when it filed a claim in the bankruptcy action. The Court ruled against the State, holding that if a State chooses to play on the bankruptcy court, it must play by the rules. "If a state desires to participate in the assets of a bankrupt, she must submit to appropriate requirements by the controlling power." *Id.* at 333. The crucial fact was that the State, by filing its claim, voluntarily accepted bankruptcy court jurisdiction over the tax debt.

The Ninth Circuit relied upon *Walker* and *Collins* for the assertion that the bankruptcy court proceedings did not implicate the Eleventh Amendment because they were not "suits" against the State. But

if these bankruptcy proceedings are truly not suits against the State, then there is no basis for the *in personam* jurisdiction over the State that would bind the State to a discharge or injunction. The binding effect of a court order over a litigant is the essence of the power that jurisdiction bestows.

The Eleventh Amendment impediment to jurisdiction over States is analogous to the jurisdictional restrictions imposed by other constitutional provisions. Thus, the absence of notice adequate to satisfy due process deprives the court of jurisdiction to bind a creditor to a discharge. *See Baldwin v. Hale*, 68 U.S. (1 Wall.) 223, 233 (1863) ("Insolvent systems of every kind partake of the character of a judicial investigation. Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified."); *Ray v. Norseworthy*, 90 U.S. 128, 135-136 (1874) ("the mortgage and privilege of the petitioner could not be cancelled and displaced without notice nor without an opportunity to be heard."); *Hanover Nat. Bank v. Moyses*, 186 U.S. 181, 192 (1902) (notice required but personal service is not). *See also City of New York v. New York, N. H. & H. R. Co.*, 344 U.S. 293, 297 (1953); *Bank Of Marin v. England*, 385 U.S. 99, 102 (1966); *Tulsa Professional Collection Services v. Pope*, 485 U.S. 478, 485 (1988); *Fogel v. Zell*, 221 F.3d 955, 962 (7th Cir. 2000); *In re Spring Valley Farms, Inc.*, 863 F.2d 832, 835 (11th Cir. 1989). Statutory provisions in bankruptcy acts have long mandated this due process requirement by conditioning a discharge on notice to creditors. *See, e.g.*, 11 U.S.C. § 523(a)(3). Lack of jurisdiction based on inadequate due process notice, just like lack of jurisdiction because of Eleventh Amendment stric-

tures, limits the power of the bankruptcy court effectively to bind a creditor to a discharge order.

The Fourth, Fifth and Ninth Circuits rested their decisions on the additional theory that *in personam* jurisdiction was unnecessary because the bankruptcy court had jurisdiction over the *res* of the bankruptcy estate, which allowed the court to make its discharge order binding. *Collins*, 173 F.3d at 929; *Walker*, 142 F.3d at 822-23; App. at 12a-13a. Finding jurisdiction over the *res* of the bankruptcy estate may work when the State wants to share in the bankruptcy estate. But it does not work if the State is willing to forgo any part of the estate. The State may choose instead to rest on its Eleventh Amendment sovereign immunity from suit by the debtor, figuring it will take its chances to collect from the debtor later, from subsequently earned income. Once the bankruptcy is completed, the estate distributed, and the case closed, the *res* is over. *See* 11 U.S.C. §§ 541(a) & 1306(a). Subsequent income never was, nor could have been, part of the bankruptcy estate because it came into existence after the closing of the bankruptcy action.

In denying rehearing, the Ninth Circuit stated: "Goldberg would interpret *Irving Trust* to permit a State to bypass federal bankruptcy proceedings altogether and yet still 'participate in the assets of the bankrupt.'" App. at 11a. This is incorrect. California was not seeking to participate in a bankrupt's estate when it levied on Ellett's post-bankruptcy wages or Artiglio's post-bankruptcy income tax refund. Bankruptcy court jurisdiction premised on jurisdiction over the *res* cannot reasonably bind the State to bar California's post-bankruptcy levies.

> If jurisdiction is based on the court's power over property within its territory, the action is called "in rem" or "quasi in rem." The effect of a judgment in such a case is limited to the property that supports jurisdiction and does not impose a personal liability on the property owner, since he is not before the court.

Shaffer v. Heitner, 433 U.S. 186, 199 (1977).

Indeed, there is good authority that even *in rem* jurisdiction will not avoid the States' Eleventh Amendment sovereign immunity. *See Nordic Villages*, 503 U.S. at 38 ("Equally unpersuasive is respondent's related argument that a bankruptcy court's in rem jurisdiction overrides sovereign immunity."); *Missouri v. Fiske*, 290 U.S. 18, 28, (1933) ("The fact that a suit in a federal court is in rem, or quasi in rem, furnishes no ground for the issue of process against a nonconsenting state.").

The Ninth Circuit decision fundamentally rejects this Court's Eleventh Amendment jurisprudence by interpreting the Bankruptcy Code to authorize private parties to sue in federal court to eliminate their state tax debts despite state Eleventh Amendment sovereign immunity. To be sure it is a good idea to give debtors a fresh start. But Congress also deems it a good idea to bar discrimination against the disabled, *Board of Trustees v. Garrett*, and the elderly, *Kimel*, to protect patent holders, *Florida Prepaid*, and trademark holders, *College Savings Bank*, against infringement and to protect workers against abuse of federal wage and hour rules, *Alden v. Maine*, 527 U.S. 706 (1999). Nonetheless, this Court has repeatedly reaffirmed in these cases that Con-

gress cannot authorize private parties to obtain Article I federal statutory relief against non-consenting States asserting their Eleventh Amendment sovereign immunity—the Supremacy Clause notwithstanding.

In both the discharge order and injunction proceeding, the Ninth Circuit ruled on the power of federal *court* to bind the State. We argue here that the Eleventh Amendment denies the debtor federal court jurisdiction over an unconsenting State to discharge a state tax or to enjoin state tax collection. This jurisdiction of the federal court over States and state officers, however, must be distinguished from the power of Congress to enact substantive laws binding on States in state courts under the Supremacy Clause. A discharge mandated by federal law, not by a federal court, might be an entirely different kettle of fish. *See In re NVR Homes, LP,* 189 F.3d 442, 453 (4th Cir. 1999) ("Although federal law may reign supreme in the bankruptcy context, the federal courts do not necessarily reign supreme over an unconsenting state's treasury."(emphasis original)); *See also* Karen Cordry, "Casey Comes To Bat Again? In Re Ellett, 254 F.3d 1135 (9th Cir. 2001)", Norton Bkrptcy Law Advisor, November 2001.

What constitutes a "suit" against the state for purposes of the Eleventh Amendment is already before the Court this term in *Federal Maritime Commission v. South Carolina State Ports Authority,* Sup. Ct. No. 01-46. The Court's decision there inevitably will inform whether these bankruptcy proceedings are suits. By granting certiorari here, these litigants will gain the benefit of the Court's current wisdom.

III
THIS CASE MERITS REVIEW.

The Court is besieged with petitions for certiorari. Some seek review of decisions that were clearly erroneous and surely a great injustice. Others seek clarification of the law for the better functioning of society and for the benefit of their own cause. Of course, both obtain here.

But more important, petitioners here are long-time public servants burdened with perhaps the most thankless—but most necessary—of public jobs, that of tax collector. The uncertainty of the law here exposes them to the additional burden of being in harms way for personal liability. As Justice O'Connor noted in her concurring opinion in *Idaho v. Coeur d'Alene Tribe*, 521 U.S. at 288:

> The *Young* doctrine recognizes that if a state official violates federal law, he is stripped of his official or representative character and may be personally liable for his conduct; the State cannot cloak the officer in its sovereign immunity.

These worthy tax collectors who administer fair, speedy and efficient state tax procedures should not be left with the sword of personal liability hanging over their heads.

CONCLUSION

For the reasons stated above, *Amicus Curiae* Multistate Tax Commission respectfully urges the Court to grant the Petition and issue a writ of certiorari to the Court of Appeals for the Ninth Circuit.

Respectfully submitted,

Paull Mines, General Counsel
Frank D. Katz, Deputy General Counsel
Counsel of Record
Multistate Tax Commission
444 No. Capitol St., NW #425
Washington, DC 20001-1538
(202) 624-8699

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